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Supreme Court, U.S.
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No. 05-878

IN THE

Supreme Court of the United States

STEVE HERRERA, *et al.*,

Petitioners,

v.

ERNESTO G. LIRA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a prisoner's complaint contains claims for which all available administrative remedies have been exhausted *and* claims for which they have not, does the Prison Litigation Reform Act require a district court to dismiss the entire action, or may it permit exhausted claims to proceed, either by dismissing only the unexhausted claims or by granting leave to amend to allege only exhausted claims?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS A SIGNIFICANT POSSIBILITY THAT THE COURT'S RESOLUTION OF THE QUESTION PRESENTED WILL HAVE NO PRACTICAL EFFECT ON THIS CASE.	5
II. THE DECISION BELOW WAS CORRECT.	7
A. The Plain Language Of 42 U.S.C. §1997e(a) Does Not Require A District Court To Dismiss The Entire Action When Faced With A Mixed Complaint.	8
B. The Congressional Policies Behind The PLRA Are Better Served By The Claim-Dismissal Rule.	9
C. The Analogy To Habeas Corpus Proceedings Is Not Persuasive, And Does Not Support An Action-Dismissal Rule.	11
CONCLUSION	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
Alloway v. Booher, No. 04-7060, 2005 WL 852714 (10th Cir. Apr. 14, 2005)	12
Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967)	7
Duncan v. Walker, 533 U.S. 167 (2001)	9
Giano v. Goord, 380 F.3d 670 (2d Cir. 2004)	11
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	5
Kozohorsky v. Harmon, 332 F.3d 1141 (8th Cir. 2003)	12
Lira v. Herrera, 427 F.3d 1164 (9th Cir. 2005)	*passim*
Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004)	8, 10, 11
Porter v. Nussle, 534 U.S. 516 (2002)	9
Reece v. Georgia, 350 U.S. 85 (1955)	7
Rhines v. Weber, —U.S.—, 125 S. Ct. 1528 (2005)	12
Robinson v. Page, 170 F.3d 747 (7th Cir. 1999)	9
Rose v. Lundy, 455 U.S. 509 (1982)	12
Spruill v. Gillis, 372 F.3d 218 (3d Cir. 2004)	11

TABLE OF AUTHORITIES

	Page(s)
Thomas v. Woolum, 337 F.3d 720 (6th Cir. 2003)	10, 12
Virginia Military Inst. v. United States, 508 U.S. 946 (1993)	6
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	7
West v. Kolar, No. 03-6265, 2004 WL 1834634 (10th Cir. Aug. 17, 2004)	12

Statutes

42 U.S.C.	
§1983	3
§1997e(a)	1, 3, 8
§1997e(c)	8
§1997e(c)(1)	8
§1997e(c)(2)	8, 10

Other Authorities

141 CONG. REC. S14611-01 (daily ed. Sept. 29, 1995)	10

Respondent respectfully requests this Court to deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005).

STATEMENT OF THE CASE

Petitioners seek review of the decision of a unanimous three-judge panel of the Ninth Circuit reversing the district court's dismissal of Respondent Ernesto Lira's action and instructing the court on remand (1) to reconsider whether Lira's complaint presents a single, exhausted claim or presents both exhausted and unexhausted claims under the Prison Litigation Reform Act (PLRA), 42 U.S.C. §1997e(a), and (2) in the event it determines the complaint presents both exhausted and unexhausted claims, to allow Lira to amend his complaint to allege only fully exhausted claims.

Lira was removed from the general population at the Deuel Vocational Institution (DVI) on December 28, 1995, and placed in administrative segregation, where he was confined to his cell for twenty-two and one-half hours each day. App. 2-3; Supp. Br. 4; ASER 137.[1] The apparent basis for his removal was his "validation" as a prison gang associate. *Id.* Lira inquired into the evidence supporting his validation at the initial review of his placement by the DVI Institutional Classification Committee, and repeated his inquiries at subsequent periodic reviews. He was told there was "some evidence" of his association with members of the Northern Structure gang, but for a period of nearly ten months no evidence was disclosed. App. 4; Supp. Br. 4-5; ASER 139, 193-97 ¶¶4-7, 207-08 ¶21.

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[1] "App." citations refer to the Petition Appendix. "Supp. Br." citations refer to Appellant's Supplemental Opening Brief in the Ninth Circuit. "ASER" citations refer to Appellant's Supplemental Excerpts of Record in the Ninth Circuit.

After seven months in segregated housing, on July 29, 1996, Lira filed an administrative grievance, asserting that the validation was improper and that no evidence supporting it had been disclosed. He sought release from administrative segregation and the removal of any validation record from his prison file. App. 4-5; Supp. Br. 7-8; ASER 71.

Lira pursued his grievance through each level of review. On August 23, 1996, it was denied at the first level, although he was informed that an investigation of his validation was underway, because the evidence "[did] not meet current departmental validation requirements." App. 5; ASER 72, 75.

While Lira's appeal of the first level response was pending, and unbeknownst to Lira, he was *re*validated under updated validation protocols. App. 6; ASER 161. Lira was denied relief at the second level on September 27, 1996, on the grounds that the *re*validation was proper. App. 6; ASER 76-77. By the time Lira received the second level response, he had been transferred from DVI to Pelican Bay State Prison, the state's highest security facility, where, again, he was confined in a windowless cell in the Special Housing Unit (SHU) for twenty-two and one-half hours each day. App. 3; Supp. Br. 9; ASER 163.

Lira appealed to the third, and final, level of review—the Director's level—after he finally received a copy of his Central File, which indicated the basis for his validation. ASER 72. Lira challenged the validation and the evidence supporting it. The Director denied Lira's appeal, framing the issue as "'[w]hether or not the institution's denial of appellant's request to release him to the general population and remove all gang related information from his Central File (C-File) is appropriate.'" App. 7; ASER 78-81. Relying on the *re*validation, the Director declared Lira's indefinite retention in the SHU appropriate. *Id.*; Supp. Br. 11; ASER 169-91. Lira's segregated confinement continued until April 14, 2004, a total of more than seven-and-a-half years.

Lira filed two related grievances during this time period. The first of these grievances, filed on April 4, 1998, again challenged his segregated housing in light of a report from the Merced County Sheriff's Department (an apparent source of validation evidence) indicating it actually had no record of gang affiliation while Lira was housed in Merced county jail. App. 7; ASER 82-84. The grievance was denied at the first and second level of review. App. 8; ASER 85-90. Lira's second related grievance, filed on November 3, 1999, sought release from his indeterminate segregated housing placement and day-for-day time credits. It was denied at the first level of review. App. 8-9.

In March 2000, Lira brought a *pro se* action in federal court in San Francisco, under 42 U.S.C. §1983, alleging that his validation as a gang associate and his confinement in administrative segregation violated due process, that defendants acted with deliberate indifference to his safety, in violation of the Eighth Amendment, and that he was denied a constitutional right of access to the courts. App. 9; ASER 1-70. The second and third causes of action were dismissed with leave to amend on a defense motion to dismiss for failure to state a claim. App. 9; ASER 91-96, 98-105. The entire suit was dismissed without prejudice on a subsequent motion for summary judgment, when the district court construed Lira's first—and fully exhausted—grievance as limited to his *placement* in administrative segregation, and his additional—unexhausted—claims as pertaining to his *retention* in administrative segregation. Supp. Br. 11-12; ASER 223-25. Believing it was faced with a mixed PLRA complaint under this construction, the district court concluded that it was required under 42 U.S.C. §1997e(a) to dismiss the entire action without prejudice. App. 9; ASER 226-27.

On appeal, Lira argued that his complaint presented a series of due process violations surrounding his validation, placement and retention that together amounted to a *single*,

exhausted claim. The Ninth Circuit (Berzon, J.) recognized the force of that argument (App. 26 n.13) and instructed the district court to consider it on remand.

In the alternative, Lira argued that the PLRA does not mandate dismissal of an entire action when a complaint includes unexhausted claims. The Ninth Circuit agreed. Finding an analysis of the statutory language and structure dispositive (*id.* at 18-19), the court rejected Petitioners' policy-based arguments that a "total exhaustion-dismissal rule" is required.[2] Instead, the court reasoned that the appropriate district court response to a mixed complaint is to dismiss the unexhausted claims and allow fully exhausted claims to proceed. *Id.* at 23. If, however, the claims do not lend themselves to easy segregation—if the exhausted and unexhausted claims are intertwined—the court should dismiss the *complaint* while giving the plaintiff leave to amend to allege only exhausted claims. *Id.* at 24.

Considering the facts of Lira's case, the Ninth Circuit expressed reservations about the district court's correlation of the number of grievances with the number of claims in Lira's complaint. *Id.* at 26-27. It instructed the district court on remand to consider whether Lira's complaint in fact presents a *single, exhausted claim*. *Id.* If the district judge again construed the complaint to present closely related exhausted and unexhausted claims, the Ninth Circuit instructed that Lira be allowed to amend his complaint to allege only his fully exhausted claim(s).

Petitioners sought rehearing *en banc*, which was denied by order dated December 13, 2005. *Id.* at 41.

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[2]The Ninth Circuit remarked that the label "total exhaustion rule" is misleading insofar as there is no dispute that all claims must be exhausted if they are to be litigated. *Id.* at 10 n.6. The two positions are labeled herein as the "action-dismissal rule" and "claim-dismissal rule."

REASONS FOR DENYING THE WRIT

I.
CERTIORARI SHOULD BE DENIED BECAUSE THERE IS A SIGNIFICANT POSSIBILITY THAT THE COURT'S RESOLUTION OF THE QUESTION PRESENTED WILL HAVE NO PRACTICAL EFFECT ON THIS CASE.

The Court should neither review *Lira*, nor hold it pending its review of the question presented, because there is a significant possibility that on remand the district court will determine that Lira's complaint presents a *single, fully exhausted claim*. Granting certiorari review of an interlocutory decision represents an exceptional practice not warranted in this case. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree").

Lira argued on appeal that his complaint does not trigger the question presented, because the various due process violations surrounding his validation and his placement and retention in administrative segregation in fact amount to one claim which was fully exhausted after the director's rejection of his administrative appeal. App. 26; Supp. Br. 49-51. The court "recognize[d] that there is force to Lira's argument" (App. 26 n.13) and instructed the district court as a preliminary matter to reconsider its construction of Lira's complaint. Only were the district court again to determine that the complaint presents both exhausted and unexhausted claims was it instructed to apply the newly established Ninth Circuit rule for responding to mixed complaints. *Id.* at 27.

Given the reasonable prospect that the district court will find that Lira's complaint presents a single, exhausted claim—*and therefore does not invoke the question presented*—the Court should deny certiorari, and exclude *Lira* from the set of pending petitions in which resolution of the question presented is outcome-determinative.

Respondent recognizes that the Court has granted certiorari in the consolidated cases of *Williams v. Overton* (Docket No. 05-7142) and *Jones v. Bock* (Docket No. 05-7058), each of which poses substantially the same question presented by Petitioners.[3] For the same reason that reviewing *Lira* to resolve that question is inappropriate, it is inappropriate to hold *Lira* pending review of *Williams* and *Jones*. Even if this Court's resolution of the question presented differs from, and supersedes, the Ninth Circuit claim-dismissal rule, vacating and remanding *Lira* to the Ninth Circuit could serve no practical purpose. The Ninth Circuit would *still* be obliged to send the case to the district court for the preliminary determination of whether Lira's is a mixed PLRA complaint. Nothing is gained by delaying that threshold determination, which may well render this Court's guidance on the question presented irrelevant to the outcome of Lira's case.

Indeed, this Court disfavors such unwarranted interference with lower court proceedings. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"). Granting certiorari, or postponing a decision pending the outcome of *Williams* and *Jones*, will cause considerable

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[3]Each poses the following question:

> Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

The *Williams* petition, in addition, asks whether an inmate must name a particular defendant in a grievance in order to exhaust remedies as to that defendant. The *Jones* petition, in addition, asks if exhaustion must be pleaded in an inmate's complaint, or if failure to exhaust is an affirmative defense that must be pleaded and proved by defendant(s).

delay in the district court proceedings, will drive up costs, and may well require another round of briefing before the Ninth Circuit; *all for no reason.* If this Court's guidance turns out to be relevant, it will be applied by the district court (or by the Court of Appeals) at that time, but it runs counter to this Court's normal approach to its appellate jurisdiction to grant certiorari because a case bears the *possibility* of invoking a question before the Court. *See Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying certiorari on ripeness grounds where court of appeals had ruled on legal issues surrounding contempt orders but remanded case for determination whether there had in fact been a contempt). And if the question presented is not resolved through the Court's review of *Williams* and *Jones*, a denial of certiorari at this interlocutory stage will not prevent Petitioners from presenting the same question after a final lower court disposition of the case. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (citing *Reece v. Georgia*, 350 U.S. 85, 87 (1955)). Given the procedural posture of *Lira*, the petition for a writ of certiorari should be denied.

II.
THE DECISION BELOW WAS CORRECT.

Even if the Court were to consider *Lira* eligible for review of the question presented in spite of its procedural posture, Petitioners offer no valid reason for the Court to disturb the Ninth Circuit ruling.

A. The Plain Language Of 42 U.S.C. §1997e(a) Does Not Require A District Court To Dismiss The Entire Action When Faced With A Mixed Complaint.

As the decision below recognizes, Section 1997e(a) sets forth "a rule regarding the *instigation* of suit . . . [but] does not prescribe the proper response by the district court if that requirement is not met." App. 13-14; *see also Ortiz v. McBride*, 380 F.3d 649, 657 (2d Cir. 2004) ("we do not think that it follows that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety—to kill it rather than to cure it"). Curiously, Petitioners do not address this key premise, and instead devote their "plain meaning" argument solely to the undisputed proposition that Congress distinguishes between "actions" and "claims" in the PLRA. Pet. 8. The Ninth Circuit readily acknowledged such a distinction. *See* App. 18 ("while 'action' in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing the *entire* action only if the *entire* action fails to meet statutory standards").

Petitioners raise no objections to any of the court's statutory bases for rejecting an action-dismissal rule, including (1) that mixed complaints are not among the defective suits and claims earmarked for dismissal in Section 1997e(c); (2) that the juxtaposition of Section 1997e(c)(2), providing for dismissal on the merits of an unexhausted *claim*, "to the reference to dismissal of an 'action' in §1997e(c)(1)[] indicates that claims that have not been exhausted can be treated independently, for dismissal purposes, from the action as a whole" (App. 16); and (3) that Section 1997e(c)(2) would be rendered superfluous if Petitioners' understanding of "action" applies to the use of the term in Section 1997e(c)(1), and thus mandates dismissal of the entire suit when any claim is frivolous, malicious, fails to state a claim, etc. *Id.* at 16, 17; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) (disfavoring statutory

interpretation that renders a provision superfluous). The Ninth Circuit properly recognized that the PLRA does not operate to overturn "'the fundamental procedural norm that when a complaint has both good and bad claims . . . only the bad claims are dismissed; the complaint as a whole is not.'" App. 18 (quoting *Robinson v. Page*, 170 F.3d 747, 748-49 (7th Cir. 1999) (interpreting an analogous use of the term "action" in the PLRA)).

B. The Congressional Policies Behind The PLRA Are Better Served By The Claim-Dismissal Rule.

Respondent and Petitioners agree that primary goals of the PLRA are to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). The Ninth Circuit claim-dismissal rule achieves those goals by ensuring that only fully exhausted claims are reviewed on the merits and by proceeding with exhausted claims in the initial suit rather than requiring that a second suit be initiated. Petitioners' assertion that the Ninth Circuit rule "obviates inmates' incentives to ensure that each of their claims is exhausted before filing suit" (Pet. 9) makes no sense. The rule forbids review of unexhausted claims and requires their dismissal; it offers every incentive to make prompt and complete use of available administrative remedies.

Petitioners' "judicial efficiency" argument is unpersuasive. They overstate the potential administrative advantage of an action-dismissal rule—namely that in certain cases a judge need only determine if some, not all, claims are exhausted[4]—and ignore the massive administrative

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[4]Even in an action-dismissal jurisdiction, a court has good reason to consider each claim—to determine if it is frivolous or fails to state a claim (§1997e(c)(2)), or to notify a plaintiff of claims that must be remedied or excised prior to refiling, and thereby prevent the inefficiency

(continued . . .)

inefficiency that such a rule invites. By requiring dismissal of the entire action instead of the defective claim(s), an action-dismissal rule necessitates the filing of a second suit, post-dismissal, in which the court must start from scratch its review of claims that were fully exhausted at the initial filing. Those same claims, moreover, may occupy much more of the court's time the second time around if the limitations period has lapsed and complicated tolling arguments need to be evaluated. Ultimately, the action-dismissal approach promises to "promote the precise inefficiency the PLRA was designed to avoid—requiring courts to docket, assign and process two cases where one would do." App. 20-21; *see also Ortiz*, 380 F.3d at 658 ("it is doubtful that action-dismissal rather than claim-dismissal will do more than require plaintiffs who bring 'mixed' actions to refile their claims with the claims that were held by the district court to be unexhausted simply omitted").

The Ninth Circuit correctly concluded that a claim-dismissal rule *better* serves PLRA policy objectives. The claim-dismissal rule fulfills PLRA objectives without the severe collateral effect of the action-dismissal rule—namely the certainty that a lapse in limitations periods will prevent some meritorious, fully exhausted claims from being heard. *See Thomas v. Woolum*, 337 F.3d 720, 726 (6th Cir. 2003) ("nothing suggests that a goal of the act, and specifically, of the exhaustion requirement, was to defeat valid constitutional claims"); *see also* 141 CONG. REC. S14611-01 at S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised").

(. . . continued)
of a second defective complaint.

C. The Analogy To Habeas Corpus Proceedings Is Not Persuasive, And Does Not Support An Action-Dismissal Rule.

Petitioners fail to address the Ninth Circuit's threshold basis for declining to base its interpretation of the PLRA exhaustion requirement on this Court's interpretation of the habeas exhaustion requirement, namely that its statutory analysis fully answered the question posed. App. 19. Although the Ninth Circuit went on to reject Petitioners' sole contention, that "the same exhaustion policy considerations hold true in a prisoner-civil-rights matter" (Pet. 10), such considerations simply did not inform the court's decision.

Petitioners likewise fail to challenge the reasons the Ninth Circuit would have rejected the habeas corpus analogy, even if it found it necessary to resort to policy considerations. With no rule precluding multiple PLRA suits, and with PLRA suits regularly combining multiple causes of action based on entirely independent factual circumstances, the *Lira* court found it unlikely that an action-dismissal rule could check piecemeal litigation in the PLRA arena, though it may well serve that policy objective in the habeas context. App. 20-22. The Ninth Circuit is not alone in rejecting the habeas corpus analogy. The Second Circuit concluded that "[t]he principles underlying habeas corpus exhaustion and section 1983 exhaustion differ significantly, making analogies between them problematic." *Ortiz*, 380 F.3d at 660-63; *see also Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004) ("the differences between habeas cases and prison litigation under §1983 are legion"). The Third Circuit, comparing habeas and PLRA exhaustion rules in a different context, found the analogy "far from perfect." *Spruill v. Gillis*, 372 F.3d 218, 229 (3d Cir. 2004). The Sixth Circuit, too, considering a procedural default rule, found fault with the habeas analogy, noting that the comity concerns that stop federal courts' hand in a habeas context

have less force in the PLRA context. *Thomas*, 337 F.3d at 728 n.2.

Finally, even if this Court's interpretation of the habeas exhaustion requirement were directly applicable to the PLRA exhaustion requirement, Petitioners' action-dismissal rule is still improper. As recognized in the Eighth and Ninth Circuits, and in recent—albeit unpublished—Tenth Circuit decisions,[5] proper application of this Court's interpretation of habeas rules contemplates granting leave to amend a mixed complaint. *See Rose v. Lundy*, 455 U.S. 509, 520 (1982) (petitioner "can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims"); *see also Rhines v. Weber*, —U.S.—, 125 S. Ct. 1528, 1535 (2005) (observing courts' discretion to allow petitioner to delete unexhausted claims, or to stay a mixed petition while unexhausted claims are exhausted, in certain cases). Only an arbitrarily limited reading of this Court's understanding of the exhaustion requirement in the habeas corpus context could support Petitioners' position.

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[5]*See Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003); App. 25; *West v. Kolar*, No. 03-6265, 2004 WL 1834634, at *2 (10th Cir. Aug. 17, 2004); *Alloway v. Booher*, No. 04-7060, 2005 WL 852714, at *1 (10th Cir. Apr. 14, 2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: March 15, 2006.

Respectfully,

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